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**ETHICS LAW AND THE LEGISLATOR**

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## TABLE OF CONTENTS

	PAGE
INTRODUCTION .....	1
THE LEGISLATOR'S ROLE .....	2
CONFLICT OF INTEREST .....	5
Post-Employment Restrictions .....	7
Prohibited Representation .....	8
Honorariums .....	9
Reporting Conflicts of Interest .....	9
FINANCIAL DISCLOSURE .....	11
Income .....	12
Gifts .....	13
Debts .....	13
ENFORCEMENT .....	14
CONCLUSION .....	16
FOOTNOTES .....	17

This policy brief is intended to survey a current issue for members of the Missouri House of Representatives and not to advocate a particular position on the issue.

# ETHICS LAW AND THE LEGISLATOR

## INTRODUCTION

Michael Josephson of the Government Ethics Center defines ethics as follows:

A system or code of conduct based on universal moral duties and obligations which indicate how one should behave. It deals with the ability to distinguish good from evil, right from wrong, and propriety from impropriety.<sup>1</sup>

This definition does not include distinguishing legal from illegal. The legal standard of conduct is that behavior required in order to avoid the possibility of legal sanctions. One may improperly execute a left-hand turn and be found guilty of violating the law without any feeling of having committed unethical behavior.

Some behavior is both legally and ethically prohibited. Such crimes are often referred to as crimes of "moral turpitude" and defined as, "behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others."<sup>2</sup> Murder, stealing, and rape would all be crimes involving moral turpitude.

An ethical standard of conduct is based on certain universal values regardless of their legality. Josephson identifies those core ethical values as

- 1) Honesty; 2) Integrity; 3) Promise-Keeping;
- 4) Fidelity/Loyalty; 5) Fairness; 6) Caring for Others;
- 7) Respect for Others; 9) Responsible Citizenship;
- 9) Pursuit of Excellence; and 10) Accountability.<sup>3</sup>

Ethical conduct is the highest standard of conduct and involves striving to do that which is right in a particular situation. Such conduct includes obeying the law, but extends beyond the legal standard. For example, promise-keeping is actionable only if the promise made is a legal contract, but for an ethical person a promise would be kept regardless of the legality of its enforcement.

Ethics legislation transforms ethical conduct into legal conduct. A common criticism of ethics legislation is that one cannot legislate morals. Indeed, as Josephson points out, "One can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the law."<sup>4</sup> The limitations of legislation to achieve true ethical conduct are recognized; however, that limitation does not negate the need for such legislation which has the potential to raise the legal standard of conduct. A legal standard may embody high ethical standards or it can be used to hide what are in fact low ethical standards.

## THE LEGISLATOR'S ROLE

This policy brief will focus on ethics legislation particularly as it applies to legislators. Legislators have two general powers in the American form of government. The first power is the power to make laws. By these laws legislators set policies which affect all aspects of people's lives, from birth to death. The second legislative power is the power to appropriate money. Billions of dollars are entrusted to legislators' decisions and the way those dollars are spent again affects all citizens.



These extraordinary powers are given to legislators by constituents in return for the legislator representing their interests. This representative capacity is the basis of the public trust to which the legislator becomes a guardian. Like a guardianship with fiduciary duties, the legislator's power is given with corresponding obligations not to betray the public trust by advancing his, or his family's and friends' interests, at the expense of the public interest. This concept is stated eloquently in Art. 1, sec. 1 of the Missouri Constitution,

That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

There are distinctions between legislators and other public officials. In Missouri legislators are "part-time" public officials; public officials in the executive branch are usually full-time. Legislators often need income above their government salary. Too rigorous elimination of conflict of interests may make it impossible for legislators to maintain their livelihoods. Controlling conflicts of interest is a matter of degree. Ownership, for example, is not in itself a conflict of interest. A threshold of value by percentage of stock or fair market value of stock is required before ownership reaches a degree requiring regulation. The degree of regulation required for legislators may be different from that required for other public officials.

Another distinguishing feature of the legislator's role is the duty to represent his constituents. It can be argued that it is unfair to deprive a district of representation over one individual's conflict,

especially if that conflict is disclosed publicly and his constituents are aware of it when the legislator is elected.

There are three broad approaches to ethics legislation which recognize the uniqueness of the legislative role and reflect a different degree of control over legislative conflicts of interest. One approach is to make exceptions or set different standards of conflict for legislators within comprehensive legislation but have only one ethics commission for enforcement. This approach is taken in the West Virginia Governmental Ethics Act.<sup>5</sup>

A second approach is to make legislators subject to a different enforcement authority than other public officials. There are many different variations on this approach. Ohio and South Carolina have three ethics commissions or committees; one for the senate, one for the house, and one for the executive branch.<sup>6</sup> In Alaska the Ethics Commission is composed of three members of the house, three members of the senate, and one public member.<sup>7</sup> Any complaint against a house member is handled by the three house members and the one public member. Any complaint against a senate member is handled by the three senate members and the one public member.<sup>8</sup>

A third approach is to make legislators subject to a separate code from other public officials. Kentucky, for example, has a statutory Code of Ethics of the General Assembly.<sup>9</sup>

The second and third approaches recognize the constitutional separation of powers doctrine. Some states have separation of power clauses which do not allow legislators to be sanctioned by anyone other than their peers, certainly not by a Commission appointed by the governor. Missouri has a separation of powers clause which states that

the three branches of government shall not exercise "any power properly belonging to either of the others."<sup>10</sup> However, the Constitution requires that all Commissions be appointed by the governor with the advice and consent of the Senate.<sup>11</sup>

The Missouri Constituion gives the sole power of impeachment to the House of Representatives for all elective executive officials of the state, and judges of the supreme court, court of appeals, and circuit courts.<sup>12</sup> Grounds for impeachment include crimes, but also include conduct involving ethical standards. An executive or judicial official may be impeached for misconduct, habitual drunkenness, corruption in office, and any offense involving moral turpitude or oppression in office.<sup>13</sup> There is no provision for impeachment of legislators, but Art. III, sec. 18, gives the House and Senate power to expel their own members by a two-thirds vote. Thus the Missouri Constitution appears to give legislators the freedom to adopt grounds and procedures for removal, including removal on ethical grounds, by utilizing the approach of their choice. This freedom may be restricted only by the constituent's freedom of the ballot.

## CONFLICT OF INTEREST

There are three essential components to any ethics scheme. (1) prohibitions of certain conflicts of interest; (2) financial disclosure; and (3) enforcement. Each component will be discussed below, with references to Missouri law, laws of selected other states, and two model ethics laws.



The basic premise of all conflict of interest legislation is that a public office is a public trust. The public interest must be advanced, not that of the office holder, family, friends, or special interest groups.

The test on whether a potential conflict of interest exists is whether the legislation would have a greater effect on the legislator than on the general public. Stated in the language of the West Virginia Statute, "when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, excused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter."<sup>14</sup> In California the following four questions must be answered by "yes" before an official is disqualified from a decision because of a conflict of interest:

1. Will the official make, participate in, or use his or her official position to influence a governmental decision?
2. Is it reasonably foreseeable that the decision will affect the official's economic interest?
3. Will the effect of the decision on the official's economic interest be material?
4. Will the effect of the decision on the official's economic interest be distinguishable from its effect on the public generally?<sup>15</sup>

Conflicts of interest may be geographical, ethnic, or even religious. However, legislation deals primarily with financial conflicts of interest. Prohibited or regulated activities which are or may be conflicts of interest include the following:

- (a) additional compensation for services to the state



- (b) solicitation of gifts
- (c) interest in public contracts
- (d) use of confidential information
- (e) representation before a state agency
- (f) revolving door employment
- (g) honorariums
- (h) nepotism

Missouri's regulation of conflict of interest is set forth in Chapter 105 RSMo (1986). The topics selected for discussion are those which have been subjects of revisions by proponents of ethics legislation.

#### Post-Employment Restrictions

Missouri law prohibits executive or administrative officials from employment for the purposes of influencing a state agency before one year after termination from that agency.<sup>16</sup> Legislators are not subject to this one year delay. They may lobby their former colleagues immediately upon leaving office.

Other states and models do apply post-employment restrictions to legislators. The West Virginia statute sets a six-month time limit after public service before one may "appear in a representative capacity."<sup>17</sup>

The Model Ethics Law for State Government developed by Common Cause (hereinafter referred to as the Common Cause Model Law) imposes a one-year post-employment restriction on legislators to represent any interest other than the state's, except in a court of law.<sup>18</sup> One year is the most common length of post-employment restriction. Florida imposes a two-year restriction on legislators.<sup>19</sup>

## Prohibited Representation

Prohibiting public officials from representing anyone before a state agency is frequently found in ethics law. The basis for this prohibition is that a public official's duty is to represent the state's interest; and he cannot serve two masters by representing an interest against the state. A basis for prohibiting legislators from representing anyone before a state agency is that legislators vote on budgets and bills affecting state agencies and thus may have undue influence on the state agency's decision.

Special consideration for legislators may be given in statutes because of their duty to represent their constituency and because their office is a part-time position. Missouri has a general prohibition against representation except for an adversary proceeding, an exception most applicable to attorneys or certified public accountants.<sup>20</sup> West Virginia permits members and former members of the legislature to appear in a representative capacity on behalf of clients before any governmental agency of the state, county, or municipal government.<sup>21</sup> The National Municipal League's Model State Conflict of Interest and Financial Disclosure law (hereinafter referred to as the Municipal League Model) prohibits a legislator from representing anyone before any state agency "for compensation or other benefit or promise thereof."<sup>22</sup> The prohibition against only *paid* representation allows a legislator to represent a constituent's interest before a state agency. The Common Cause model is similar to Missouri's in that it gives a general prohibition, but allows for exceptions, such as representation in an adjudicatory proceeding.<sup>23</sup>

## Honorariums

Regulation of honorariums is designed to eliminate undue influence. In Missouri, there is neither a law prohibiting honorariums nor one requiring the disclosure of honorariums. Other states take each alternative. Ohio requires the disclosure of any honorarium over \$500.<sup>24</sup> West Virginia, on the other hand, prohibits the acceptance of an honorarium by an elected public official.<sup>25</sup> The Common Cause Model recommends prohibition as the preferred practice, but suggests as an alternative that specific financial disclosure, detailing the amount, source, and date of acceptance, should be required.

## Reporting Conflicts of Interest

Once a legislator discovers that he has a conflict of interest there is no controversy that the conflict should be disclosed. However, to whom it should be disclosed becomes a matter of debate and whether a conflict requires abstaining from participation and even voting is a serious policy issue.

The constitutions of several states enjoin legislators from voting on measures in which they have a personal interest.<sup>26</sup> The National Municipal League model code does not require a legislator to abstain from voting but requires disclosure to the clerk of the house for inclusion in the official legislative record.<sup>27</sup> The Common Cause model allows a legislator to vote on general, but not "special" legislation in which he has a conflict of interest.<sup>28</sup> Special legislation is that



legislation which is directed at a specific situation, individual or entity as distinguished from legislation which affects an entire group, class or segment of society.

Missouri law gives a legislator the option of filing a written report of the nature of any substantial interest in any measure or bill proposed or pending before the General Assembly before he passes on it, or of filing one written report with the Chief Clerk of the House or the Secretary of the Senate that discloses any substantial interest that he may have at any time during the session. If the member elects the one global disclosure he is thereafter relieved from filing a written report on each measure or bill proposed or pending.<sup>29</sup> Substantial personal or private interest is defined as an interest in a business entity of ten percent or of a value of \$10,000 or as compensation of \$6,000 per year.<sup>30</sup> In Missouri a legislator's only duty is to disclose a conflict of interest. There is no duty to abstain from voting even if a conflict of interest exists; however, the choice of voting "present" is always an option.

In West Virginia, legislators may request permission to abstain from voting from the Speaker of the House or the President Pro Tempore. Included in their ethics law is the provision that members who have asked to be excused from voting and who are required to vote by their presiding officer shall not be guilty of any ethics violation.<sup>31</sup>

## FINANCIAL DISCLOSURE

Financial disclosure is an integral part of any conflict of interest legislation. It is the linchpin for enforcement of conflicts of interest. Its purpose is to disclose any possible financial conflicts of interest, not to disclose a candidate's net worth. Without disclosure, enforcement of conflict of interest is too difficult for practical purposes. For example, in Missouri a legislator should report honorariums on his tax return. However, this is not a public document, nor are bank records and most other financial documents. One should not have to be an investigator in order to determine whether a legislator has a conflict of interest. Public financial disclosure allows citizens to determine whether their legislator is acting in their best interest or in his personal interest. Proponents argue disclosure aids legislators to determine areas of potential conflicts and heightens their awareness to comply with the law.<sup>32</sup> Opponents argue that public financial disclosure prevents good candidates from running for office in order to protect their privacy.

Disclosure statements include the officeholder, spouse and members of the household. However, they do not necessarily require a list of assets by individual. This balances privacy needs with the public's right to know whether financial conflicts exist. The interests of adult children are not usually required to be disclosed.

Financial disclosure statements often require information on income, gifts, real property, creditors, and securities.

## Income

Disclosure of income may be accomplished by requiring disclosure of specific amounts and services or by requiring disclosure according to category. Disclosure by category is generally considered less onerous than disclosure by specific amounts. The threshold amount is different depending on the models. New Jersey requires disclosure by category of every source of income over \$1,000 while West Virginia requires disclosure by category of every source of income over \$5,000.<sup>33</sup> The categories in the National Municipal League are as follows:

Category I - less than \$5,000

II - 5,000 - 24,999

III - 25,000 - 99,999

IV - 100,000 + 34

Common Cause uses "greater than \$1,000" as its threshold requiring disclosure.<sup>35</sup>

The Missouri threshold of substantial interest is \$6,000 for "salary, gratuity, or other compensation or remunerations .. per year from any individual, partnership, organization, or association."<sup>36</sup> Missouri law does not require disclosure by either specific amount or by category. It requires only that "the nature of the (substantial) interest" be disclosed.<sup>37</sup> In practice such disclosures range from statements that the member or spouse "is employed by Company X" to even less specific disclosures of "salary of spouse."

Disclosure of sources of income may be particularly burdensome to an attorney/legislator whose client does not wish to have the association



made public. Some legislation is drafted to require disclosure of payments received from particular clients. Missouri's law could be interpreted in this way, however, it has not been. Such requirements have been upheld as long as the nature of the representation was not revealed.<sup>38</sup> The West Virginia law on disclosure states "This subdivision does not require a person filing a statement who derives income from a business, profession or occupation to disclose the individual sources and items of income that constitute the gross income of that business, profession or occupation."<sup>39</sup>

### Gifts

Gifts are another category required in disclosure statements which vary greatly in the amount required for reporting or requirements for their disclosure. Missouri has no specific prohibition against gifts -- only the general term "anything of actual pecuniary value" in prohibiting bribery.<sup>40</sup> West Virginia requires disclosure of gifts over \$500.<sup>41</sup> Common Cause suggests a threshold of \$50.<sup>42</sup> Connecticut has an annual limit of \$50.<sup>43</sup> States often have "de minimis" provisions which allow the Ethics Commission to establish by rule, or the courts by case law, that value below which one does not have to disclose gifts.

### Debts

Missouri law does not require disclosure of creditors. A listing of creditors may also have a monetary threshold for reporting. Both

model codes use \$1,000.<sup>44</sup> West Virginia uses \$25,000 and exempts mortgages on primary and secondary homes as well as automobiles and debts required in the ordinary course of business.<sup>45</sup>

## ENFORCEMENT

The third essential component of effective ethics legislation is strong enforcement provisions. Traditionally, control of conflicts of interest have been by self-restraint, restraint by peers and criminal punishment. Sutherland Stat Const sec. 14.05 (4th Ed). Criminal punishment is a method sometimes found in ethics law. By itself it is inadequate for a number of reasons. Four primary reasons given for this inadequacy are:

(1) The apparatus for discovery, apprehension, and prosecution may be inadequate. This is so partly because responsibility for initiative rests on persons who are part of the same "establishment" with officials whose conduct is to be controlled. (2) Use of criminal sanctions makes it necessary to surmount the extraordinary burden of proof beyond a reasonable doubt which applies in the criminal law. (3) Strict construction of criminal laws makes it too easy to escape their restrictions by subtle methods of evasion and circumvention. (4) Procedures for criminal law administration tend to be more cumbersome than procedures in non-criminal proceedings.<sup>46</sup>

The creation of an Ethics Commission or Board is the most popular enforcement mechanism among states today. It combines prevention with punishment. A Board can also serve in an educational capacity. Another method is to empower the Secretary of State, as the chief election officer, to promulgate rules and regulations in this area.<sup>47</sup> Missouri's statute directs complaints to the Attorney

General's office with prosecution of legislators left to the local prosecutor.<sup>48</sup> The Attorney General's office reports no complaints have been filed in the last several years.<sup>49</sup> The potential for partisan politics to play a role in decisions is apparent. Safeguards against partisanship are necessary. For this reason, Ethics Commissions may vary in number of members but are usually bipartisan.

The independence of a commission to fulfill its mission will determine its effectiveness. A Commission offers more than a mechanism for prosecution. It can monitor disclosure statements, educate officials, and give guidance through advisory opinions regarding conflicts of interest.

The legislature holds the power to ensure the success or the defeat of any enforcement efforts. Through the legislative process the powers and duties of the Commission are prescribed. Some of the powers and duties include:

- a. promulgate rules and regulations
- b. hold hearings
- c. conduct audits
- d. publish advisory opinions
- e. subpoena witnesses
- f. appoint special prosecutors
- g. hire staff

The statutory authority given to a Commission to sanction violators usually includes a variety of remedies. Penalties may be either civil or criminal and fines range from \$100 to \$10,000.

Alabama's Ethics Commission has the authority to remove a name from a



ballot if that candidate has failed to file a financial disclosure statement before the election.<sup>50</sup> Louisiana recently expanded the authority of its Board of Ethics for Elected Officials to not only rescind contracts but include rescission of permits and licenses if tainted by ethical violations.<sup>51</sup>

Regardless of the authority given a Commission, its mission is easily undermined by lack of funding. Commissioners are typically reimbursed on a per diem basis, established by statute, but they must go through the appropriations process for full-time staff, salaries and other expenses. A case in point is Rhode Island whose Commission reported 1500 failure to file cases, many of which were not pursued because of lack of resources.<sup>52</sup>

## CONCLUSION

Ethical conduct and ethical decision-making cannot be legislated. The question is can legislation raise the current legal standard of conduct to embody higher ethical standards than are now embodied in current law? Furthermore, would such legislation improve government "for the good of the whole?"

## Footnotes

1. M. Josephson, *Power, Politics and Ethics: Ethical Obligations and Opportunities of Government Service*, at 1 (3rd ed. 1989).
2. Black's Law Dictionary 910 (5th ed. 1979).
3. Josephson, *supra*.
4. Josephson, *supra* at 4.
5. W. Va. Code, Ch. 6B (1987 and Cum. Supp. 1989)
6. Ohio Rev. Code Ann. sec. 101.34, 102.05 (Baldwin 1976); S.C. Code Ann. sec 8-13-210 (Law. Co-op 1986).
7. Alaska Stat. sec. 24.60.130 (1985).
8. Alaska Stat. sec. 24.60.140 (1985).
9. Ky. Rev. Stat. Ann. sec. 6.765-6.850 (Michie/Bobbs-Merrill 1988).
10. Mo. Const. art. II, sec. 1.
11. Mo. Const. art. IV, sec. 51.
12. Mo. Const. art. VII, sec. 1.2.
13. *Ibid*.
14. W. Va. Code, Ch. 6B-1-2(c) (Cum. Supp. 1989).
15. A guide to the Political Reform Act of 1974, *California's Conflict of Interest Law for Public Officials*. California Fair Political Practices Commission.
16. RSMo. sec. 105.454(5) (1986).
17. W. Va. Code, Ch. 6B-2-5(g)(1) (Cum. Supp. 1989).
18. Model Ethics Law for State Government, Ch. IV, sec. 8.3 Common Cause (1989).
19. Fla. Const. art. II, sec. 8(e).
20. RSMo. sec. 105.456(3) (1986).
21. W. Va. Code, Ch. 6B-2-5(g)(4) (Cum. Supp. 1989).
22. Model State Conflict of Interest and Financial Disclosure

- Law, sec. 12(a), National Municipal League (1979).
23. Common Cause *supra* at Ch. IV, sec. 8.3.21.
  24. Ohio Rev. Code Ann. sec. 102.2(A)(2) (Baldwin 1976).
  25. W. Va. Code, Ch. 6B-2-5(c)(3) (Cum. Supp. 1989).
  26. Ala. Const. art. IV, sec. 82, Ky. Const. sec. 57; Tex. Const, art III, sec. 22; La. Const. art. III, sec. 29; Pa. Const. art. III, sec. 13; Wyo. Const. art. III, sec. 46.
  27. National Municipal League, *supra* at sec. 17 (a)(ii).
  28. Common Cause, *supra* at Ch. IV, sec. 3.3.
  29. RSMo sec. 105.460 (1986)
  30. RSMo sec. 105.450 (8) (1986)
  31. W. Va. Code, Ch. 6B-2-5 (i) (Cum. Supp. 1989).
  32. Common Cause, *supra* at 10.
  33. sec. 2:14 a(1), S. Con. Res. 107, 1982, N.J.; W. Va. Code, Ch. 6B-2-7 (3) (Cum. Supp. 1989).
  34. National Municipal League, *supra* at sec. 10.
  35. Common Cause, *supra* at Ch. V, sec. 2.1. 1.
  36. RSMo. sec. 105.450(7) (1986).
  37. RSMo. sec. 105.460 (1986).
  38. National Municipal League, *supra* at sec. 10(h) comment.
  39. W. Va. Code, Ch. 6B-2-7 (3) (Cum. Supp. 1989).
  40. RSMo. sec. 105.452 (1) (1986).
  41. W. Va. Code, Ch. 6B-2-7(8) (Cum. Supp. 1989).
  42. Common Cause, *supra* at Ch. V., sec. 2.1.6.
  43. Conn. Gen. Stat. sec. 1-84(j) (1989).
  44. National Municipal League, *supra* at sec. 10(g); Common Cause, *supra* at Ch. V, sec. 2.1.4.
  45. W. Va. Code Ch. 6B-2-7(6) (Cum. Supp. 1989).
  46. Sutherland Stat Const. sec. 14.05 (4th Ed.).



47. *State Legislative Ethics* at 4, the National Conference of State Legislatures.
48. RSMo. sec. 105.468 (1986).
49. Telephone conversation with Hiram Watson, Assistant Attorney General.
50. Ala. Code sec. 36-25-15(d) (1977).
51. La. Rev. Stat. Ann. sec. 1152 A. (West Cum. Supp. 1989).
52. R. Judd, *Ethics Codes and Commission, Legislation and Litigation in 1988* at 7, Council on Governmental Ethics Laws.